No. 415 Sup. Ct. 1901

Brief of Powell for Respondent

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JAMES H. MCKENNEY

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed Nov. 4, 1901.

No. 415.

NASHUA SAVINGS BANK,

Petitioner,

vs.

ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, Limited,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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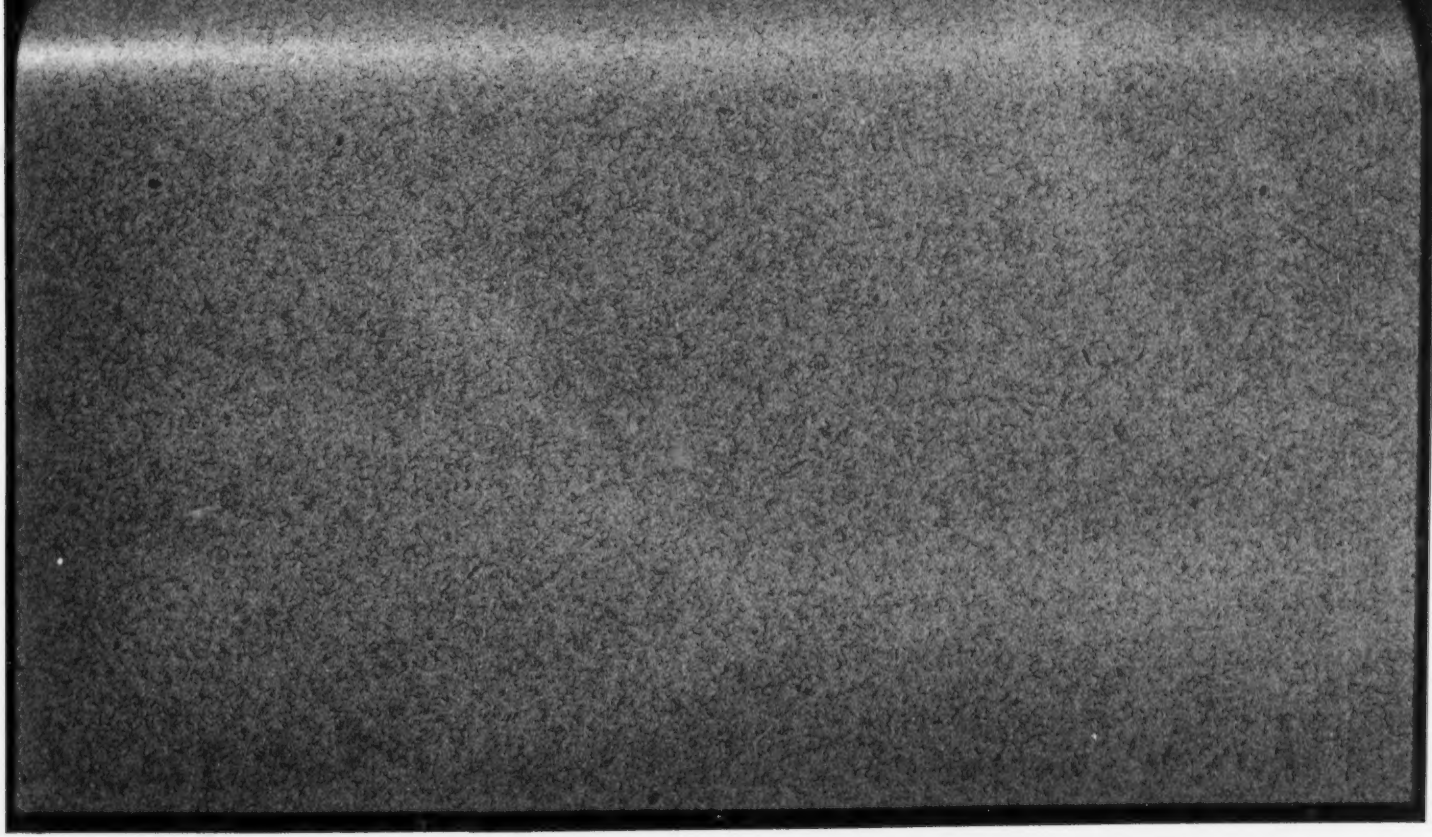

The Supreme Court of the United States.

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NASHUA SAVINGS BANK,
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ANGLO-AMERICAN LAND MORTGAGE AND AGENCY COMPANY, LIMITED,
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Brief in Opposition to Petition.

Statement of Questions Raised.

Counsel for petitioner presents in his brief five points upon which he asks the review of this Court:

I. (p. 3.) That the Circuit Court of Appeals "*erred in refusing to consider the question as to whether the Circuit Court should or should not have directed a verdict.*"

II. (p. 4.) "*That the evidence of record can not support the verdict unless aided by the presumption that the proceedings in the organization of this foreign company and in laying the assessment, were regular, legal and for a lawful purpose.*"

III. (p. 6.) Whether "*the Statutes of Great Britain were proved according to the established rules of law.*"

IV. (p. 9.) "*The defective or insufficient statement of plaintiff's case in the declaration.*"

V. (p. 10.) Error "*in holding that this action could be maintained in the New Hampshire District without evidence of an express promise.*"

Respondent contends that the petition should be denied, because:

(1) The Circuit Court of Appeals decided these points correctly.

(2) The record is so fragmentary and defective that only one question (of evidence) is presented.

(3) There are no open questions of *gravity* or *importance* calling for a review of this Court.

Answering petitioner's first point (p. 3), we say:

Whether the Trial Court erred in directing a verdict for plaintiff, and in refusing a direction for defendant below, requires a consideration of *all* the evidence introduced upon the trial. As the record does not contain all the evidence, nor purport to contain all the evidence, the point must be dismissed.

See opinion of Court below, and

City of Providence vs. Babcock, 70 U. S., 240-244.

Texas & Pacific R. R. Co. vs. Cox, 145 U. S., 593-606.

Hansen v. Boyd, 161 U. S., 397.

Yates vs. United States, 90 Fed. Rep., 57-62.

The argument of counsel (p. 3 of brief) that the statement "*the plaintiff introduced the following evidence*" imports that what follows is all the evidence, is neither logical nor in accord with the decisions of the Federal Courts.

Upon appeal the presumptions are that the proceedings below were regular, and that the evidence supported the verdict. Hence, on questions going to the sufficiency of the evidence it must be *affirmatively* shown that the record contains all evidence.

Answering petitioner's Second Point, (p. 4,) we say:

Whether the evidence *of record* supports the verdict is immaterial. The verdict was based, not upon the evidence in this record, but upon the evidence produced on the trial, and as that evidence is not all [redacted] before the Court, this point is not open for consideration.

The argument of Judge Aldrich is unwarranted where, in his dissenting opinion (p. 5), he contends that the statement in the record (p. 27), "*The statutes, memorandum* and *articles of association, certificate of stock, and Frederick Herbert Ramsden's testimony constitute all the evidence bearing upon the question of the plaintiff's incorporation and organization,*" must be construed as meaning that all the evidence is in the record.

The statement is not that *all* the statutes are in the record, or that *all* Articles of Association are in the record, or that *all* Ramsden's testimony is in the record. The English Statutes were fully proved. Many sections were read. Ramsden's testimony was voluminous, going directly to the regularity of the call and its necessity. Surely

counsel cannot ask this Court to decide what presumptions are applicable, without showing the evidence upon which the presumptions must be predicated.

Presumptions of fact are based upon the state of the evidence as a whole. See 2 Wharton Ev., Sec. 1226.

Upon the trial at Circuit the statutory authority to make calls are shown. Some of this evidence is in the record (pp. 18-24). The making of calls under the authority of these Statutes and the Articles of Association was fully shown. The regularity, legality and lawful purpose of the calls was proved.

Counsel for the petitioner goes outside of the record (p. 5 of his brief) where he says: "The evidence in the case at bar, as has been said in the dissenting opinion, consists entirely of some (we say irregular) proof of the English Statutes, the Articles of Association and the call and notice of it." If he had put all the evidence in the record he would have shown more fully the deposition of Hildebrand Ramsden, (see record, p. 15) and the evidence in open Court of the Treasurer of the Nashua Savings Bank, upon these very points, showing calls made in the manner laid down by the English Statutes and the Company's Articles of Association, and that notice thereof was received by the Bank and produced in Court by it (see record, p. 43).

As this Court will not consider the statements of counsel *pro* and *con* as to what the evidence not in the record showed, we desist.

Counsel's contention (p. 5 of his brief) that as foreign judgments are impeachable, the acts of foreign corporations should also be impeachable, may be a good statement of law.

The defendant below had the right to attack the

acts of the plaintiff company by showing fraud or other illegality, but nothing of the kind was either alleged or proved (record, pp. 42-43).

Upon the question of presumptions of regularity of the proceedings of private corporations, Justice Story in Bank of the United States vs. Dandridge (12 Wheat., p. 70), said:

> "The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation, are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. *In short, we think* that the acts of *artificial persons afford the same* presumptions as the acts of natural persons. Each affords pre-

> sumptions, from acts done, of what must have preceded them, as matters of right or matters of duty."

In speaking of foreign corporations, this Court, in Relfe v. Rundle (103 U. S., 222–226), said:

> "Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

Canada Southern R. R. Co. vs. Gebhard (109 U. S., 527), is directly in point.

Upon the impeachability of foreign judgments see Hilton vs. Guyot (159 U. S., p. 188), where the Court said:

> "The rule is that the foreign judgment is to be received, in the first instance, as *prima facie* evidence of the debt; and it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained."

Answering petitioner's Third Point (p. 6) we say:

That the witness Ramsden (Record, pp. 15, 16) qualified himself as an attorney at law and entitled to speak as to what the English Statute Law is, cannot be doubted. His competency is not questioned in petitioner's brief.

Did he sufficiently authenticate the Statutes produced?

He testified:

That the Statutes produced were "*issued by authority, being printed by Her Majesty's printer, and are, as such, by law receivable in evidence without further proof.*"

This being an action at law, the rules of evidence within the State of New Hampshire prevail (Rev. St., Sec. 721; Connecticut Mutual Life Ins. Co. vs. Union Trust Co., 112 U. S., 250-255).

Upon the trial Judge Putnam allowed the testimony upon the authority of Hall vs. Costello (48 N. H., 176; see Record, p. 42). In that case the facts were that two New Hampshire attorneys went to Canada, where upon inquiry they learned what the Canadian law was upon the matter in issue. On their return home they were allowed to testify orally as to what the Canadian law was. As the New Hampshire Courts are so liberal in holding that attorneys who made a visit to a foreign country and upon inquiry ascertain from attorneys there what the law is will be held to have qualified themselves to speak as to what foreign law is, certainly the testimony of an attorney educated and practicing under the law of the foreign country is better qualified.

If the witnesses in Hall vs. Costello had brought home with them Statutes of Canada it certainly cannot be that the Statutes so produced would be less competent than their oral testimony.

The Court below (p. 2) held that these Statutes were sufficiently authenticated and we refer to their opinion and the authorities there cited.

If the decision of cases outside of New Hampshire be pertinent, we submit the following:

> An expert or other credible witness may testify as to the official or authoritative character of the printed volume of foreign law

produced. (Pacific Gas Company vs. Wheelock, 80 N. Y., 278; and Dundee Mortgage, Trust and Investment Company vs. Cooper, 26 Fed. Rep., 665.)

From an examination of authorities, we find that both modes have been sanctioned (see Barrows vs. Downs, 9 R. I., 446).

One of the best considered cases upon this subject is The Pawashick, 19 Fed. Cases, 5 (#10851) (2 Lowell, 142), where Judge Lowell (p. 8) held that books of "acknowledged or ascertained authority" were competent proof of English law, and that "an oath is not necessary in all cases." Again on the same page he asks: "Whether the idle, unnecessary and obsolete mode of verification should be insisted upon?" Further (on the same page) he says that the law of England can be proved book by books and experts.

In Jones vs. Moffit, 5 S. & R., 523, a copy of the Irish Statutes sworn to by a barrister as having been received from the King's Printer, was held competent.

In Lacon vs. Higgins, 3 Stark, 178, Abbott, C. J., admitted a copy of the French Code produced by the French Consul, who swore that the copy produced was used and acted upon by him. This copy purported to be printed by the Royal French Printers, where the French Laws were printed.

In Merrifield vs. Robbins, 8 Gray, 150, the Statutes of Vermont having printed on the title page "By Authority" was held to purport publication by the Government of Vermont and competent.

There is no New Hampshire Statute on this subject. Counsel does not argue and it cannot bo seriously doubt·d that Ramsden has shown

the Statutes produced to be the officially printed Statutes of England. We submit that the Statutes produced were verified by the oath of the witness. The evidence carried upon its face verity and certainty, equal if not greater than is usually required of a witness in proof of facts.

There is no reason for a more strict rule. Authentication is a question for the Court. The English law is an open book to Judges and Lawyers. Our libraries are filled with English text books, reports and Statutes. The Courts are continually citing them in their opinions. When a Judge will take a book from his library shelf, cite it in his opinion as a decision of the English Courts and follow it as an authority, why should an Attorney do more than present the same book and swear that it is an official print.

This is at most a question of practice. As the Federal Courts have adopted the state rules of evidence, it is of local application only, and presents no question of general importance.

Upon petitioner's Fourth Point (p. 9 we say:

The sufficiency of the statement of plaintiff's case in the declaration was not raised by the motion to direct a verdict for the defendant below. If the sufficiency of the declaration had been raised, the Trial Court could have ordered it amended so as to conform to the proofs.

The question, however, is not reversible Rev. St., Sec. 954, provides that "no writ * * * declaration * * * judgment * * * shall be * * * reversed for any defect or want of form," etc. See also opinion of Court below (p. 4) upon this point.

Upon petitioner's Fifth Point (p. 10) we say:

Proof of an *express promise* was unnecessary as defendant was liable as a stockholder upon the implied promise of all stockholders to pay up to the par value of the stock (See Record, pp. 46, 47, 48, and authorities there cited).

Again we must refer to the fact and say that this question cannot be decided as all the evidence as to promise is not in the record. The statement in the record (p. 26) does not mean that all the evidence of promise was in the record.

Counsel's chief point, however, is that under the New Hampshire decisions there must be an express promise to pay. There is no New Hampshire Statute upon this subject, and where counsel refers to the "Laws of New Hampshire" he has in mind the common law as interpreted by that State. The Common Law is in theory the same in all States. While the State Courts may place upon it different interpretations the Federal Courts will not be bound thereby, but will exercise an independent judgment.

On questions of stockholder's liability, this Court has already expressed itself.

> In Webster vs. Upton, 91 U. S., 69, this Court said: "If its intention was that the whole capital might be called in, it is difficult to see why the subscriber, knowing the intent, does not impliedly engage to pay in full for shares when payment is required."

1 Angell & Ames on Corp., § 534.
Redfield on Railways, 53.
Pullman vs. Upton, 96 U. S., 328.
Fenn vs. Brown, 142 U. S., 56.
Chubb vs. Upton, 95 U. S., 665.

In Upton vs. Tribilcock, 91 U. S., 45–48, the Court sai l:

"The acceptance and holding of a certificate "of shares in a corporation make the holder "liable to the responsibilities of a sharehold- "er."

"A promise to take shares of stock imports a promise to pay for them (Palmer vs. Lawrence, 3 Sandf., Sup. Ct., N. Y., 161). An acceptance and holding of a certificate has the same effect * * *" (see also 2 Thompson on Corp., § 1568).

Kinds of Cases Reviewable on Certiorari.

In Lau Ou Bew Petitioner, 141 U. S., 583 and again, in Forsyth vs. Hammond, 166 U. S., 506, this Court laid down the rule that it would review the Circuit Court of Appeals only "when questions of gravity and importance were involved."

While attorneys may not with certainty anticipate in any particular case what this Court would hold to be a question of "gravity and importance" we find that in *ex parte* Woods, 143 U. S., 202, it was held that whether the Circuit Court properly construed a State Statute upon a question of practice or properly applied the rule of law governing a servant's right of recovery against his master for injuries, did not fall "within the category of questions of such gravity and general importance as to require review." So we say here that the record is so defective that it only presents the question whether the English Statutes were proved according to the New

Hampshire rules of evidence. This question is local and not of general importance.

We also insist that the Circuit Court of Appeals decided correctly.

Respectfully submitted,

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